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JAMES D. MAHAN  
ON

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1920.

No. [REDACTED] 157

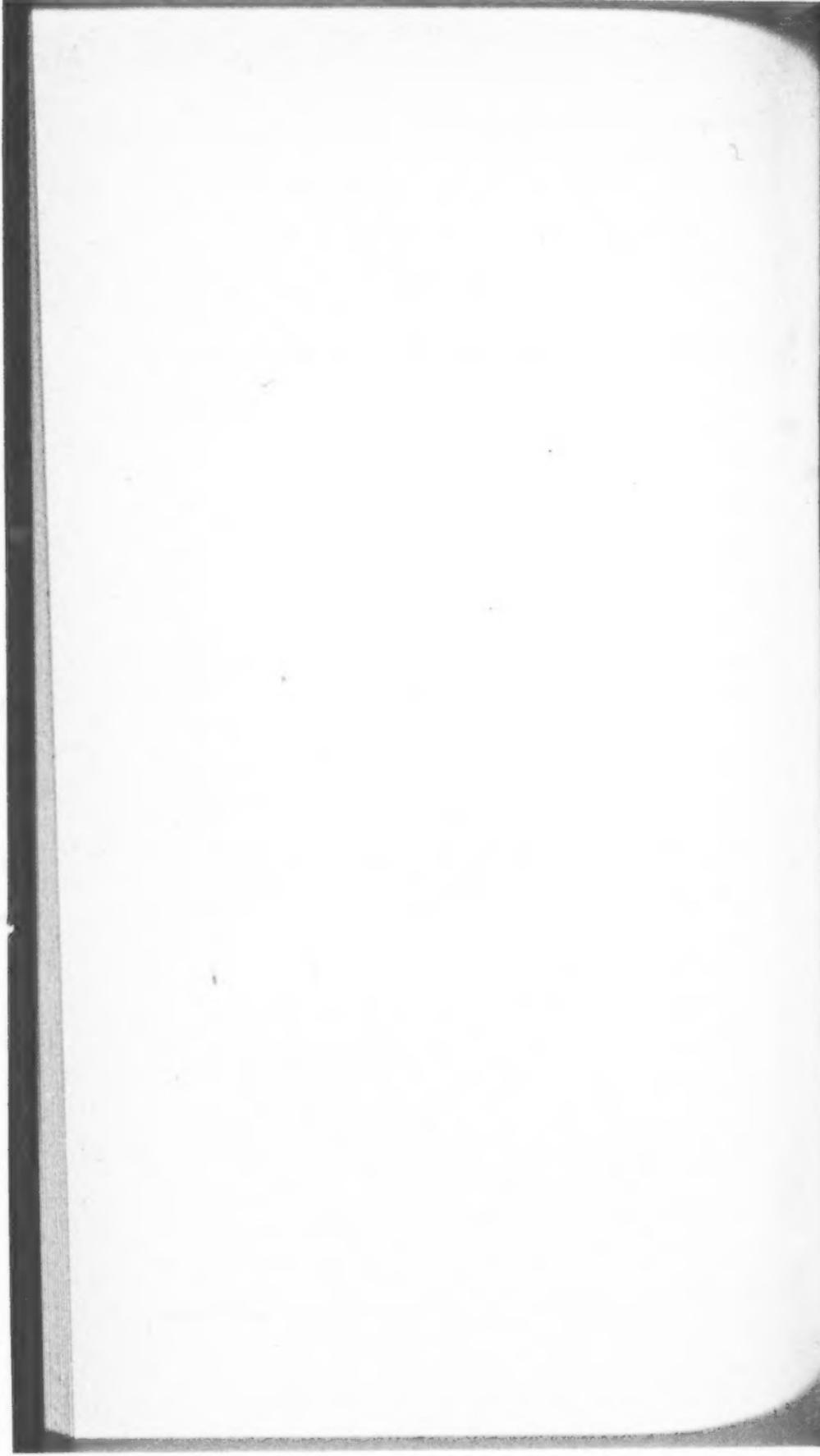
JOHN S. KENDALL, ADMINISTRATOR, ETC., ET AL.,  
*Appellants,*  
v.

PAUL A. EWART,  
*Appellee.*

ON APPEAL FROM THE CIRCUIT COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO DISMISS OR AFFIRM.

HENRY C. LEWIS,  
*Attorney for Appellee.*



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1920.

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No. 592.

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JOHN S. KENDALL, ADMINISTRATOR, ETC., ET AL.,  
*Appellants,*

v.

PAUL A. EWART,  
*Appellee.*

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ON APPEAL FROM THE CIRCUIT COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT.

---

MOTION TO DISMISS OR AFFIRM.

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Appellee respectfully moves the Court to dismiss the appeal herein for want of jurisdiction in this Court to entertain the appeal because the decree of the Circuit Court of Appeals is not appealable to this court.

If the Court has jurisdiction, appellee respectfully moves the Court to dismiss the appeal because the case

has been settled by compromise and stipulation of dismissal; or to affirm the decree below because the appeal is frivolous.

#### STATEMENT.

Kendall's deceased, George Redeagle, a Quapaw Indian, filed the complaint herein against defendant (appellee here) in the United States District Court for the eastern district of Oklahoma (2). He alleged that he inherited from another Quapaw, as part of the latter's allotment, one hundred acres of land. That he sold the said land to Franklin M. Smith, and that while the purchase and deed were in the name of Smith, the real purchaser was defendant. That Smith afterward conveyed to defendant. The complaint admits that the deed from Redeagle to Smith was approved by the Secretary of the Interior, but alleges that defendant was disqualified as purchaser because at the time of the purchase he was a special assistant to the Attorney-General of the United States, employed by the latter to conduct certain legal proceedings involving Quapaw allotments; that by reason of his official employment defendant had an "influence" over Quapaw Indians; that defendant knew that plaintiff needed cash and therefore schemed with Smith to purchase from plaintiff for an inadequate sum. That plaintiff would not have conveyed to Smith had the former known the latter was agent for defendant. The complaint prays that defendant be declared a trustee for plaintiff and to account to the latter for a mortgage given by defendant and for rent.

The answer (11) admits the two conveyances, that defendant was the real purchaser, and that he was em-

ployed at the time of purchase by the Attorney-General in certain legal work involving Quapaw lands, but denies that his employment was of the scope and character alleged in the bill, and denies that he was disqualified as a purchaser. The answer avers that plaintiff petitioned the Secretary of the Interior, through the Indian Agent, for the sale of his land under the Act of May 27, 1902 (32 Stats., 245-275) which provides for the sale of inherited Indian allotments under the supervision of the Secretary, the conveyance to be valid if approved by him. That the land was thereupon publicly advertised for sale by the agent for two separate periods, and that no one bid; that upon a third publication the defendant, through Smith, bid thirteen hundred dollars, which was more than the official appraisement, and that the bid was accepted and the sale and deed approved by the Secretary. Avers that defendant had purchased other inherited land in his own name while in the same employment and that such purchase had been approved by the Attorney-General and the Secretary. Denies any breach of duty, sets up the statute of limitation, pleads estoppel because plaintiff stood by while defendant made valuable improvements, and avers that the institution of the suit was not the voluntary act of the plaintiff.

No issue raised by the pleadings was determined by the Circuit Court of Appeals.

#### *In the trial court.*

Testimony was taken, the case heard on the issues raised by the pleadings, and the trial court entered a decree thereon for defendant on March 4, 1918 (83).

On July 17, 1918, there was filed in the trial court a stipulation between plaintiff and defendant, dated

July 5, 1918, dismissing the suit "with prejudice," plaintiff therein stating that the suit was not his voluntary act (186). That stipulation was entered on the appearance docket (187).

On August 21, 1918, the district judge allowed plaintiff an appeal to the Circuit Court of Appeals (178). The appeal was perfected on the same day (178-81).

Subsequently, on September 2, 1918, attorneys for plaintiff filed in the district court a "Petition to cancel and set aside stipulation for dismissal" (183-4), alleging that the stipulation had been procured by certain false and fraudulent representations. No action on that petition was taken by the district court except as hereinafter shown, and plaintiff docketed the appeal.

*In the Circuit Court of Appeals.*

On January 6, 1919, appellee (defendant) filed a motion "To dismiss the appeal and strike case from the docket," the motion setting up the stipulation and alleging that the attorneys for plaintiff had fraudulently procured the appeal because they knew, at the time they procured it, that the stipulation for dismissal had been filed and docketed (199). On the same day the Circuit Court of Appeals referred the case back to the trial court,—

"With directions to investigate the circumstances of the stipulation for dismissal of the suit filed in said court on July 17, 1918, as appears from the transcript of the record now on file in this Court, and to report to this Court its findings and evidence whether in fact and law said stipulation is a final settlement of the case. This cause and the motion to dismiss will stand continued in this court pending the receipt of the report from said District Court" (200).

On February 7, 1919, the death of Redeagle was suggested and the suit revived in the name of Kendall, administrator, and certain heirs at law (204).

On Sept. 6, 1919, the District Court reported its findings on the reference, which were that the stipulation was fairly obtained and for a consideration of \$700, the report concluding thus:

"I find as a matter of fact and as a conclusion of law that said stipulation is valid, and in fact and in law is a final settlement of the issues involved in the above styled case" (217-18).

Appellants filed, in the Circuit Court of Appeals, exceptions to the report of the District Court (351), and appellee filed answer thereto (352). Order of submission (356).

On March 1, 1920, the Circuit Court of Appeals dismissed the appeal because of the settlement and stipulation of dismissal (267) (357).

Petition of appellants for rehearing (358). Denied (359).

On Aug. 23, 1920, Circuit Judge Stone allowed an appeal to this Court (360).

## BRIEF.

*This court has not jurisdiction and the appeal should therefore be dismissed.*

### I.

The case is not one in which there was a consent decree and therefore appealable as were N. C. & St. L. Ry. v. U. S., 113 U. S., 261, 266; U. S. v. Babbitt, 104

U. S., 767, 768; Pacific R. R. v. Ketchum, 101 U. S., 289, 295, 297; and Eustis v. City of Henrietta, 74 Fed., 577, 578. The only decree nisi here was involuntary, after a hearing. But that decree and all other anterior proceedings <sup>were</sup> swept away by the stipulation of dismissal, which left nothing presented by the record to the appellate court. That the settlement was made and the stipulation filed after decree does not change the situation; Wood Paper Co. v. Heft, 8 Wall., 333, 336; Dakota County v. Glidden, 113 U. S., 222, 225; Cleveland v. Chamberlain, 1 Black, 419; Lord v. Veazie, 8 How., 251, 254; Thorp v. Bonnifield, 177 U. S., 15; Benner v. Hayes, 80 Fed., 953; People v. Burns, 78 Cal., 645; Hunter v. Dickinson, 3 Colo. App., 372; Salmon v. Pixlee, 2 Day (Conn.) 242; Monnett v. Hemp-hill, 110 Ind., 299; Ziegler v. Hyle, 45 Kan., 226; Lee v. Vacuum Oil Co., 126 N. Y., 579. Even had there been no stipulation, a voluntary dismissal after decree would have barred the appeal; Macrea v. Nelan, 33 Ga., 205; Bradley v. Gilbert, 155 Ill., 154; State Bank v. Hayes, 3 Ind., 400; Miller v. Keith, 26 Miss., 166; Mahncke v. Tacoma, 1 Wash., 18. In both classes of cases the appeal or writ of error was dismissed. Even where the settlement or agreement of dismissal is not made until after the case reaches this court the appeal will be dismissed; Bucks Stove & Range Co. v. Am. Fed. Labor, 219 U. S., 581; Addington v. Bruce, 125 U. S., 693.

It is true that plaintiff may not dismiss after decree without consent of court, because the decree may be adverse to him, or it may be one by which defendant acquires affirmative rights, and plaintiff could possibly sue again (14 Cyc., 400); and this even though defendant consents (Chic. & Alton R. R. v. Union Rolling

Mill Co., 109 U. S., 702, 714-15). But here the trial court ultimately found the agreement "in fact and in law a final settlement of the issues," hence the decree was superseded by the stipulation and there was therefore no decree nisi before the Circuit Court of Appeals.

Even had there been such a decree before that court, the stipulation was a bar when set up as such, and such a decree would therefore not have impaired the force of the motion to dismiss in that court. So that even if it be assumed that that court was the one to give its consent it did so by the dismissal.

## II.

A voluntary non-suit will not support an appeal because it is an abandonment and because plaintiff is not allowed to take inconsistent positions; Evans v. Phillips, 4 U. S., 347; Cen. Trans. Co. v. Pullman's Car Co., 139 U. S., 24, 39, and cases cited; Schulte v. Kelly, 124 Mich., 332; Cossar v. Reed, 17 Q. B., 540. The same reasons apply to a voluntary dismissal. The stipulation here was really a retraxit because it was made by the party himself and not by his attorney; Lambert v. Sandford, 2 Blackf. (Ind.) 137; Bacon's Abr., "Non-suit;" Bouvier's Law Dict. A retraxit is an "open, voluntary renunciation of the claim in court, by which plaintiff forever loses his action;" U. S. v. Parker, 120 U. S., 89, 95. A voluntary dismissal is an "abandonment" of the proceedings; *ibid*; the same after judgment; Minor v. Mechanics' Bank, 7 U. S., 445, 464. The difference between non-suit and such a dismissal is only that the former is always taken before decree; and is never an estoppel against a new

suit (U. S. v. Parker, *supra*, 95), while the dismissal may be made at any time not prejudicial to defendant, or by agreement at any stage; and is an estoppel if plaintiff so agrees (Jacobs v. Marks, 182 U. S., 583, 592) as here.

A voluntary dismissal "is in the nature of a nonsuit" and "does not operate on the merits"; Baer Bros. v. Denver & R. G. R. R., 233 U. S., 479, 491, citing others in this court. The question in those cases was whether such a dismissal is a bar to a new suit. Of course the dismissal here is such a bar because it is "with prejudice," but that question is not in this case. The point here is that a voluntary dismissal is inherently one which does not operate on the merits and therefore there is nothing from which to appeal. The estoppel does not change its inherent character in its relation to the merits; it is simply an agreement not to sue again.

In any event it is the fundamental law of this court that only a final decree nisi, and one which settles all the issues raised by the pleadings, will support an appeal. Here, as a result of the stipulation, there is no decree at all, so the Circuit Court of Appeals had no jurisdiction and so dismissed the appeal. So here.

### III.

The stipulation was filed and attacked in the trial court and it was therefore the province of that court to determine its validity. That was not an issue raised by the pleadings. And as a voluntary dismissal is a matter of discretion (Pullman's Car Co. v. Trans. Co., 171 U. S., 138, 146; Chic. & Alton R. R. v. Union Rolling Mill Co., 109 U. S., 714; Georgia Pine Turpentine

Co. v. Bilfinger, 129 Fed., 131; Streets' Fed. Eq. Pr., vol. 2, p. 806), and therefore not appealable, certainly the finding that the dismissal was valid is equally so, as that very question underlies that discretion. So that the Circuit Court of Appeals had nothing to do but dismiss. So here. If it be assumed that it was the province of the latter court to decide that question, and that it did so as appears probable from its decree, that was discretion in that court and, by the same token, not appealable here.

Of course the finding below that the stipulation is valid assumes its validity from every possible angle, so that question cannot be argued here from any angle.

If, *by any chance*, this Court should consider that question (evidence for defendant 279-335, 341-349) it is only necessary to say that two courts below found the facts in favor of the stipulation, which under the established rule precludes discussion here. The only question independent of those facts which was raised by appellants below assumes that the trial court was wrong in not entering a decree for plaintiff on the merits because defendant was prohibited by law from purchasing and urges that therefore the stipulation should not be upheld because it is an attempt to validate an invalid transaction; as to which it is sufficient to say that the stipulation operates on nothing but the suit.

*Even if this court has jurisdiction it should dismiss or affirm.*

(a) The only possible question in the record is the validity of the stipulation, and that was discretion below, so that if, *by any chance*, this court has jurisdiction, it has nothing to do but dismiss, for the case is in the same situation as though the stipulation had

been filed in this Court, as in *Addington v. Bruce, supra*, or the agreement had been announced in this Court, as in *Bucks Stove & Range Co. v. Am. Fed. Labor, supra*, whereupon the court dismissed the appeals.

(b) The dismissal of the appeal below was because it had been erroneously allowed. But even if that appeal be assumed to have been good, but dismissed as a direct result of the stipulation, a voluntary dismissal does not operate on the merits, as does a decree by consent, and is therefore not within *N. C. & St. L. Ry. v. U. S., 113 U. S., 261*, and the others cited with it in the first paragraph of this brief. But if it is,—although it is idle to suggest it, because here there was ultimately no decree nisi and the decree of dismissal does not operate on the merits—that decree should be affirmed forthwith because those cases all declare that while this Court must take jurisdiction of an appeal from a consent decree, it will not permit appellant to assign as error the very decree to which he has consented, but will affirm. So that the appeal is not only so frivolous as to require no further argument, but the rule of those cases positively precludes it. So the case should be affirmed forthwith.

Respectfully submitted,

**HENRY C. LEWIS,**

*Attorney for Appellee.*

To

**ARTHUR S. THOMPSON, Esq., Miami, Oklahoma;**

*Attorney for Appellant.*

Please take notice that the foregoing motion and brief will be submitted to the court on Monday, March 14, 1921, or as soon thereafter as counsel can be heard.

**HENRY C. LEWIS,**

*Attorney for Appellee.*

FILED

MAR 19 1921

JAMES D. MAHER,  
CLERK

No. [REDACTED] 157

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BRIEF IN OPPOSITION TO DISMISS  
OR AFFIRM.

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ARTHUR S. THOMPSON,  
Attorney for Appellant.

HIRAM W. CURREY,  
*of Counsel.*

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**STATEMENT.**

Plaintiff's intestate filed suit in the District Court for the recovery of his Quapaw Indian land alleging: That intestate was at time of execution of the deed a full blood Quapaw Indian and his land

restricted from sale; that the defendant was at such time a special assistant Attorney General of the United States commissioned to investigate illegal sales and leases to Quapaw lands and bring prosecution to cancel same (Petition Record 2-7); that being employed in Indian affairs defendant was prohibited and disqualified from purchasing or being interested in a trade with the intestate by reason of public policy and Revised Statute of the United States, Section 2078, which reads:

"No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending herein, shall be liable to a penalty of five thousand dollars, and shall be removed from his office."

That defendant realizing his disqualification secured a dummy to take the title and hold for him. Defendant admits this (His answer Record, page 15). The trial court tried this case with *Bluejacket v. Ewert* and by order used same evidence in each, the court found for the defendant in each case and both cases were appealed to the Circuit Court of Appeals. Defendant filed with the Appellate Court motion to dismiss this case on ground he had settled the case with plaintiff's intestate George Redeagle (Record 199). The purported settlement was a stipulation signed, pending appeal, by defendant Ewert and the full blood Indian plaintiff without his attorney's knowledge (Record 186). The Appellate Court upon presentation of said

motion to dismiss made an order (Record 200) referring to the District Court the matter for investigation, directing the taking of testimony and reporting same back with its findings thereon. The Judge of the District Court made his findings (R. 218) and reported the evidence back to the Circuit Court of Appeals. Exceptions to the findings were filed by appellant (Record p. 251). The Circuit Court of Appeals upon consideration of the motion to dismiss and upon a consideration of the findings of Judge R. L. Williams "and upon a reading and consideration of the evidence on which that finding is based," dismissed the appeal (Record 357).

An appeal was taken from this order of dismissal to this court. In the companion case, *Bluejacket v. Ewert*, filed in this court and numbered 624 and 653, the Record page 189 contains the opinion of the Court of Appeals holding that defendant Ewert was disqualified from dealing with those Indians and annulling his deed as to the minor plaintiffs, but denying relief to the adult plaintiffs on account of delay in bringing suit. The adult plaintiffs in Bluejacket case are now appealing to this court and asserting that laches and limitation statutes do not bar a restricted Indian.

The appellee herein now moves dismissal of this appeal.

## QUESTIONS.

- (1) The judgment of the Circuit Court of Appeals dismissing the appeal was a final judgment from which an appeal may be taken.
- (2) The original transaction of Ewert whereby he purchased this restricted Indian land was prohibited by statute and public policy and therefore utterly void.
- (3) A prohibited act, violative of public policy, cannot be ratified, compromised, or settled.

### I.

The judgment of the Circuit Court of Appeals dismissing appellant's appeal was a final order from which an appeal may be taken.

"Final decree" for the purpose of determining right of appeal should not be used in its technical sense. The correct test is: *Did the action of the Circuit Court of Appeals in dismissing the appellant's appeal terminate the controversy between the parties?* If it did, there can be no question as to its finality for the purpose of appeal.

"This finally determined the entire controversy litigated between the parties and nothing remained but to carry the decree into execution. \*

\* \* It is there shown that where the entire subject matter of a suit is disposed of by a decree, the mere fact that accounts remain to be adjusted

and the bill is retained for that purpose, does not deprive the adjudication of its character as a final and appealable decree."

*Lewisburg Bank v. Sheffey*, 140 U. S. 445.

"The litigation of the parties as to the merits of the case is terminated, and nothing now remains to be done but to carry what has been decreed into execution. Such a decree has always been held to be final for the purpose of an appeal."

*Winthrop Iron Co. v. Meeker*, 109 U. S. 180-183.

"A decree, to be final for the purpose of appeal must leave the case in such a condition that, if there be an affirmance in this court, the court below will have nothing to do but to execute the decree it has already entered."

*Dainese v. Kendall*, 119 U. S. 53.

Here the intestate of appellant had a judgment rendered against him by the trial court from which he had an unquestioned right of appeal. He was perfecting his appeal when defendant obtained (fraudulently we claim) a stipulation from the Indian plaintiff dismissing with prejudice the cause of action sued upon. The stipulation carried the style of the case in the trial court. *It was never presented to or acted upon by the trial court.* The appeal being perfected, upon motion filed by appellee Ewert, the Circuit Court of Appeals dismissed the appeal. No further action could be taken. The judgment of the trial court denied the Indian's claim to this property. He had an appeal to a court where the judgment might be reviewed on its merits. It

has been denied him. Nothing could be more final and decisive in the matter.

We claim the stipulation was obtained fraudulently, but even if obtained fairly we assert it is void as a matter of law because it is necessarily tainted with the vice and invalidity of the original purchase. We are entitled to the judgment of this court on this question.

At the time the Circuit Court of Appeals filed its opinion in *Bluejacket et al. v. Ewert*, holding that the transaction was within the condemnation of the United States Revised Statutes, Section 2078, *supra*, an order was entered in this case as follows:

"This cause came on to be heard on the transcripts of the records from the District Court of the United States for the Eastern District of Oklahoma, the motion of appellee to dismiss the appeal, the finding and conclusions of said District Court under the order of reference of this court, etc., and the exceptions of appellants, and was argued by counsel.

Upon consideration of the motion of the appellee to dismiss the appeal in this cause on the ground that this suit was compromised and settled by the agreement of the parties before the appeal was taken, and upon a consideration of the finding of the Honorable R. L. Williams, United States District Judge, that the stipulation of compromise and settlement on which the motion was founded was valid 'and in fact and in law is a final settlement of the issues involved' in this suit, and upon a reading and consideration of the evidence on which that finding is based and the arguments and briefs of counsel.

It is hereby ordered, adjudged and decreed that the appeal in this cause be, and the same is

hereby, dismissed with costs; and that Paul A. Ewert have and recover against John S. Kendall, administrator of the estate of George Redeagle, deceased, and Josephine Abrams, LeRoy Redeagle and Doane Redeagle, children and heirs at law, in the place and stead of George Redeagle, deceased, the sum of twenty dollars for his costs herein, to be collected according to law.

March 1, 1920."

The language in this decree,

"and upon a consideration of the finding of the Honorable R. L. Williams, United States District Judge, that the stipulation of compromise and settlement on which the motion was founded was valid 'and in fact and in law is a final settlement of the issues involved' in this suit and upon a reading and consideration of the evidence on which that finding is based and the arguments and brief of counsel," etc.,

is inconsistent with any other view than that the Court of Appeals passed its own independent judgment on the validity, force and effect of the compromise agreement.

What does the Court of Appeals mean by the language

"and upon a reading and consideration of the evidence on which that finding is based"?

It had all the force and effect of an order affirming the judgment of the trial court. It had the effect of giving Ewert the full benefit of the trial court decree. Under what possible theory can this court refuse to review that judgment and pass its own judgment on the legal correctness of the decree of the Court of Appeals?

Counsel for appellee argues that the stipulation was a matter for the discretion of the trial court. We say

the trial court sitting as a court has never passed upon the validity of this agreement. The matter was referred to the trial judge sitting as a referee or commissioner *only*, and he was directed to take the testimony and report the same with his findings. He did so. Exceptions were filed to his findings and the Circuit Court of Appeals by its order makes it plain it was passing upon the evidence before it and drawing its own conclusions of law therefrom. The report of the trial judge thereon had no greater force than if the reference had been made to a member of the bar of the court. Counsel again says that if the Circuit Court of Appeals treated the matter as a hearing before it, then it was a matter of discretion and not appealable. The discretion was the duty to apply the law of construction to the stipulation. It did so, and we claim erroneously, thereby finally terminating appellant's rights. One's right to have final judgment of the law passed on his controversy cannot be disposed of by saying it is discretionary.

This court in

*Farmers Loan Co.*, 129 U. S. 206, at page 215, said:

"The other reason given why the appeal should not be granted is that the action of the Circuit Court in the case is one within its discretion. All we have to say upon this subject is, that if it be an authority vested in the judges of the Circuit Court, it must be exercised and governed by the principles of a judicial discretion, and the very point to be decided upon an appeal here is, whether they had such discretion, and whether they exercised it in a manner that cannot be reviewed in this court.

"The question is one which in its nature must be a subject of appeal. Whether the court below can exercise any such power at all, after the case has been removed from its jurisdiction into this court by an appeal accompanied by a supersedeas, is itself a proper matter of review; and still more, whether, in the exercise of what the court asserts to be its discretionary power, it has invaded established rights of the petitioners in this case, contrary to law, in such a manner that they can have no relief except by an appeal to this court. This is a matter eminently proper to be inquired into upon an appeal from such an order. Upon the hearing of that appeal this court may be of opinion that the order was one proper to be made, in which case it will be affirmed. If, however, it believes that it was an improper one, and will seriously prejudice the rights of the petitioners, it will be reversed and set aside as it should be."

## II.

**The original transaction of Ewert whereby he purchased this restricted Indian land was prohibited by statute and public policy and therefore utterly void.**

A deed obtained by a "person employed in Indian affairs," within the purview of the foregoing Sec. 2078, from a full blood Indian, is not merely *void* in the sense that it is subject to be avoided, *but it is a nullity*, at the time it is made, and passes *not title at all, at any time*.

In *Telephone & Telegraph Co. v. Evansville*, 127 Fed. 187, 196 & 197, it is stated:

"Complainant's counsel confuse the words 'void' and 'voidable.' Such confusion has frequent-

ly occurred in statutes and decisions of courts, but in the cases cited in the original opinion herein the Supreme Court of the United States used the word 'void' in its strict and proper sense; and in the case of Central Transportation Co., *supra*, in the paragraph quoted in the original opinion, the court held the contract in that case to be 'not voidable only, but wholly void, and of no legal effect.' 'Contracts to do acts that are illegal, criminal or contrary to public policy \* \* \* are absolutely void.'

"The law cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law." *Gibbs v. Balliner Gas Co.*, 130 U. S. 396, 410.

In *Toole v. Gaines*, 25 Okla. 141, 143, it is stated:

"A contract which the law denounces as void is necessarily no contract whatever, and the acts of the parties in an effort to create one in no wise bring about a change of their legal status. The parties and the subject matter of the contract remain in all particulars just as they did before any act was performed in relation thereto. So that in the case at bar, when defendant made, executed, and delivered to plaintiff her deed to the tract of land, both parties knew, and are held to have known, that no transfer took place, that the grantor still owned the land and was still entitled to its possession, and that the grantees received naught for the money he paid, except the grantor suffered him to go into possession of the land."

In *Central Transp. Co. v. Car Co.*, 139 U. S. 24, 61, it is stated:

"that the rule 'stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;'"

In *Hedges v. Dixon Co.*, 27 Fed. 304, 306, it is stated:

"It was either good or bad, dead or alive, when it left the hands of the promisor. Take this illustration: If, in a state where usury avoids the entire contract, a usurious note be given, that note is void, and no willingness of the payee, no act of his, can transform that invalid into a valid contract. Of course it would be very satisfactory if the promisee, by consenting to a reduction of the interest, could give validity to a void promise, vitality to a dead contract."

In *Norbeck & Nicholson Co. v. State*, 32 S. D. 28, 33, 142 N. W. 847, 850, it is stated:

"But in no one of these cases, nor indeed in any case which has come under our observation, have the courts entertained any contract, or any rights growing out of a contract, where either the consideration was base, or the contract was against the express prohibition of the law. This, then, is the undoubted rule, that when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent; for to permit this would be for the law to aid in its own undoing."

Said the court, in dealing with a contract which contravened public policy in *Minn. D. & P. R. Co. v. Way*, 34 South Dakota, 435:

"The appellant had no legal authority to 'permit' that which constituted the consideration for this contract. It was an illegal consideration, which in effect, was no consideration."

If the appellee contends that this was an executed transaction and that he has had possession of the lands since the date of the first transaction, and therefore not within the rules of this case, his contention is answered by this court in *Pullman Car Co. v. Transp. Co.*, 171 U. S. pages 149 to 151, inclusive.

Mr. Ewert's only answer to the challenge of his right to take this deed was that the Interior Department and the Attorney General gave him permission to buy the land. See his answer R. P. 11-27 and his testimony Rec. pp. 93 and 101. But this court in most emphatic language answers that contention against him in *Prosser v. Finn*, 208 U. S. 67, 74 and *Waskey v. Hammer*, 223 U. S. 85, 94.

*Sage v. Hampe*, 235 U. S. 99 the court say:

"But the policy involved here is the policy of the United States. It is not a matter that the states can regard or disregard at their will."

In the Sage case, this court struck down a contract between white men concerning Indian land. They were not dealing direct with the Indian but the court held it contrary to public policy.

Here Ewert was employed to protect the property of this Indian. He dealt with and purchased the very subject matter of his trust in violation of a positive stat-

ute and the policy of the United States. *Bluejacket v. Ewert*, 265 Fed. 823.

The validity of the original purchase by Ewert determines the force and effect to be given the dismissal. This will be presented on the merits of the case.

### III.

**A prohibited act, violative of public policy, cannot be ratified, compromised, or settled.**

This case was determined in favor of the defendant on the same evidence as the case of *Bluejacket, et al v. Ewert*, and, by an order of the trial court entered in each case, the evidence in each was considered the evidence in the other. The judgment in both cases was for the defendant. Both cases were appealed to the Circuit Court of Appeals. Both cases were submitted to the trial and appellate courts on the same evidence and the same legal contention. An appeal was taken from the Circuit Court of Appeals to this court, in the Bluejacket case by defendant Ewert, and also by the adult plaintiffs, and that case is here now as number 624 and 653. The record showing the evidence in each was made the evidence in the other is as follows:

(*Kendall v. Ewert*, Rec. here No. 592, p. 83.)

"This cause was heretofore on March the 15th, 1917, consolidated for trial with the case of Carrie Bluejacket *et al*, against Paul A. Ewert, this defendant, Equity Number 2299, and the evidence taken in said cause, Equity Number 2299, considered as the evidence in this case."

And,

(*Ewert v. Bluejacket*, and *Bluejacket v. Ewert*, Rec. here, Nos. 624 & 653, p. 87.)

"This cause was heretofore on the 15th of March, 1917, consolidated for trial with the case of George Redeagle, against Paul A. Ewert, this defendant, Equity Number 2293, and the evidence taken in said cause, Equity Number 2293, considered as the evidence in this case."

The Circuit Court of Appeals held that the transaction was within the condemnation of the said section 2078. See opinion of court in Record in 624, and 653, or *Bluejacket v. Ewert*, 265 Fed. 823, which is supported by *U. S. v. Douglas*, 190 Fed. 482. Ewert's first deed was therefore, as held by C. C. A., illegal and void, and hence by it he got no title.

The original contract being contrary to public policy, this settlement is likewise contrary to public policy. The rule on the subject is, that if the compromise agreement is in any way connected with the original agreement (the original agreement being against public policy) the compromise is illegal and void even though there be an independent and new consideration.

As a part of the so-called settlement agreement, Ewert took a deed to this restricted land. See testimony of witness Hallam, Rec. p. 303, as follows:

"Q. At that time there was another paper executed?

A. At that time there was a quit-claim deed executed.

Q. I show you paper marked Defendant's Ex-

hibit #6 and ask you if that is the paper that was executed at that time.

A. It is.

Mr. Ewert: Defendant offers Defendant's Exhibit No. 6 in evidence. Any objection?

Mr. Currey: No.

And thereupon Mr. Ewert read Defendant's Exhibit #6 to the court."

And he submitted the same to the department for approval. See Exhibit 6, Rec. pages 348 and 349.

The deed so taken was and is part of the compromise agreement, and Ewert cannot shut out any of these matters connected with his compromise instrument. *McMullen v. Hoffman*, 174 U. S. loc. cit. 657; *Embrey v. Jemison*, 131 U. S. loc. cit. 348, including the pleadings in the case; because these constitute the blazed trail which carries the court back to the original transaction, condemned as violative of public policy. As was said in *McMullen v. Hoffman*, 657:

"Here you cannot stir a step but through that illegal agreement; and it is impossible to enforce it."

As above stated, Ewert, as part of the agreement on which he bases his motion to dismiss this appeal, took from the Indian a deed to this land and presented it to the Department for approval—he used his judgment as a means of inducing the Indian to make him this second deed; the deed is on the form of the Indian Department deeds of incompetent Indians (Rec. 348, 349). His first deed being illegal, his reliance must be on his compromise and the judgment of the Court of Appeals

sustaining it as valid and it is that judgment which we are here endeavoring to have reviewed on a matter of law and conclusions of fact, both of which we contend were erroneous.

The first and only judgment ever rendered on the stipulation was by the Court of Appeals rendered (on the report of Judge Williams) dismissing appellant's appeal —the judgment from which we appealed to this court. The said stipulation has not the force of a judgment, and the right to be heard on our contention that it is utterly void is as sacred as the right to institute the suit in the first instance.

In *U. S. v. Barber*, 219 U. S. 72, defendants plead in abatement or bar and the parties filed stipulations with reference thereto. The court said, pages 77 and 78:

"So far as the claim based upon the stipulation is concerned, it is plainly without merit, since we can only look to the judgment which was actually entered to determine what was decided with respect to the fourth count, and the court in that judgment expressly placed its decision that the United States could not prosecute the defendants upon the plea of the bar of limitations."

The effect of sustaining this motion and dismissing this appeal, is to leave Mr. Ewert in possession of this Indian's land under a deed made in violation of Sec. 2078, an illegal deed, and the court by its own act defeats the acts of Congress.

The contention is, and must be, either that Ewert took title by the settlement or that the settlement was

a confirmation and ratification of the prior illegal agreement; but as a ratification or confirmation it is void. (*Capell v. Hall*, 7 Wall. 542, 558, 559; *Cont'l Wall Paper Co., v. Sons. Co.*, 212 U. S. 227, 263.) In the last case it is said:

"No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reason. Wherever the contamination reaches it destroys. The principle to be extracted from all cases is, that the law will not lend its support to a claim founded upon its violation."

The Indian was as completely incompetent to make the contract as was Ewert. Both were prohibited from making a contract the law forbids. The Indian's right to prosecute his suit was not alone a private right. It was a right founded on public policy of the United States and the government was concerned that its policy be upheld, not given or contracted away. This court asks the question in *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 234, whether an action would lie for breach of a contract not to interpose a defense of public policy and answered it in this statement:

"It appears not, and the reason is, that the right to make the defense is not only a private right to the individual, but it is founded on public policy which is promoted by his making the defense, and contravened by his refusal to make it. \* \* \* With regard to all such matters of public policy, it would seem that no man can bind himself by estoppel not to assert a right which the law gives him on reasons of public policy."

We suggest to the court that if this motion is granted the appellant will be deprived of his legal right to have the judgment of the trial court reviewed holding that appellee is the rightful owner of this land and the Circuit Court of Appeals holding in a companion case, *Bluejacket v. Ewert*, that the trial court judgment was erroneous and that Ewert's deed was void. Ewert then obtains title to this restricted Indian land by a stipulation of dismissal *with prejudice* which forever bars a new action; obtains, as part of the compromise, a new deed while the land is restricted from sale, and all contrary to and violative of Acts of Congress pertaining to sale of said lands and the conduct of its officers.

This cannot be legally done.

The Supreme Court of Oklahoma beginning with *Bell v. Fitzpatrick*, 157 Pac. 334, 53 Okla. 574, and large number of cases following, condemn such a proposition.

In *Bell v. Fitzpatrick, supra*, the court said:

"The effect which counsel seek to give the purported orders of dismissal is to divest the title of plaintiff in and to the lands in question and reinvest it in defendant. While they say that it amounts to a judgment quieting title, this is another way of saying the void deed is given validity and effectiveness in this indirect way when such deed is an absolute nullity. \* \* \* Neither can defendant by any device or scheme acquire that title in violation of the public policy of the United States, as expressed in the various Acts of Congress affecting matters of this character."

See also:

*Brown v. Anderson*, 160 Pac. 724.

*Jefferson v. Gallagher*, 150 Pac. 1071.

also,

*Goodrum v. Buffalo*, 162 Fed. 817.

It is so here. To give effect to the deed or stipulation is in effect removal of the restrictions imposed by Congress and depriving the Indian of his right to enjoy his land guaranteed by the Federal Government.

In *Goodrum v. Buffalo*, *supra*, the Eighth Circuit Court of Appeals in a case involving similar questions and also a Quapaw Indian, said:

"It should be understood, once for all, that no scheme or device, however ingenious or plausible, concocted by any person, can avail to divest the Indian of the title to their allotted lands within the period of limitation prescribed by Congress."

Contracts against public policy are not enforced or recognized by the courts because of the paramount interest of the public. The compromise settlement here as construed by the Court of Appeals ignores the public interest and is therefore a nullity.

"Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by a judg-

ment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case. By designating the agreement in question as illegal and the alleged combination as an unlawful one, we simply mean to say that such is the character of the agreement as claimed by the Government. That question the Government has the right to bring before the court and obtain its judgment thereon. Whether the agreement is of that character is the question herein to be decided."

*U. S. v. Freight Association.* 166 U. S. 309.

Also :

*Northern Pac. R. R. v. Ter. of Washington,*  
142 U. S. 492, 509.

*U. S. v. Allen.* 179 Fed. 13-17.

In *Heckman v. United States*, 224 U. S. 413, at page 437, it is stated :

"While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States."

It is admitted that the Court of Appeals in *Blue-jacket v. Ewert*, 265 Fed. 823, held Ewert's deed and act was unlawful and void. Then the Redeagle deed was void, the land is still restricted in the hands of the Indian, but because the old incompetent full blood Indian signed the stipulation for dismissal, his heirs are forever barred from having the erroneous judgment reviewed and the title has been reinvested in Ewert in direct violation of law.

**Conclusion.**

The judgment appealed from is final because it effectively terminated the controversy and forever barred appellant from instituting suit; it is erroneous because the court in effect held that a void and prohibited act may be settled and compromised giving effect to the original unlawful act and further because the restricted Indian has been divested of his restricted land by a scheme contrary to the policy of the United States.

Respectfully submitted,

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